

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs August 8, 2006

**STATE OF TENNESSEE v. JOHNNY L. BURNS**

**Direct Appeal from the Criminal Court for Davidson County  
No. 2004-A-592 Cheryl Blackburn, Judge**

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**No. M2005-01945-CCA-R3-CD - Filed February 26, 2007**

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The appellant, Johnny L. Burns, was convicted by a jury in the Davidson County Criminal Court of selling less than .5 grams of cocaine within 1,000 feet of a school zone. He was sentenced as a Range I standard offender to eleven years incarceration in the Tennessee Department of Correction. On appeal, the appellant challenges the trial court's instruction on the lesser-included offense of casual exchange and the length of the sentence imposed. Upon review of the record and the parties' briefs, we reverse the judgment of the trial court based upon erroneous jury instructions and remand for a new trial.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Reversed; Case Remanded.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J.C. McLIN, JJ., joined.

Jeffery A. DeVasher (on appeal), Amy D. Harwell and Virginia Flack (at trial), Nashville, Tennessee, for the appellant, Johnny L. Burns.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. Factual Background**

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At trial, the State's proof revealed that on November 5, 2003, at approximately 6:30 p.m., Officers Justin Fox and Ron Black were riding southeast of downtown Nashville in an unmarked vehicle. Officer Fox was driving the vehicle. The officers were working undercover, attempting to make purchases of crack cocaine in an area known for drug activity. Officer Black described the

area as being “like McDonald’s, you know, you can buy anything you want there.” A support unit of other officers monitored the activities of Officers Fox and Black via an electronic transmitting device; however, no recording of the events was made.

Officers Fox and Black drove on Lafayette Street and moved into the left turn lane to drive onto Lewis Street. The intersection of Lafayette Street and Lewis Street was near J.C. Napier Elementary School. While in the turn lane, the officers saw the appellant standing in the grass of J.C. Napier Homes, a low income housing development located near the intersection of Lafayette Street and Lewis Street. The appellant waved at them as they made the turn onto Lewis Street.

After the officers completed the turn, the appellant asked, “What do you need?” Officer Fox told the appellant that he wanted “a thirty,” meaning he wanted thirty dollars worth of crack cocaine. The appellant told the officers to pull over, motioning toward the side of the street. Officer Fox parked the car, and the appellant approached the driver’s side window. The appellant handed Officer Fox a rock of crack cocaine. Officer Fox then handed the appellant thirty dollars in cash, “just like a normal transaction at Walmart.” Officer Fox asked the appellant if he could contact him in the future should he need more drugs. The appellant gave Officer Fox a number where he could be contacted. Shortly after the transaction was completed, Officer Fox gave the “take-down” signal, and the support unit came in to arrest the appellant. No cellular telephone, pager, or other contraband was found on the appellant’s person. The rock tested positive for cocaine and weighed .19 grams.

At trial, the appellant testified to a slightly different version of events. The appellant said that earlier in the day of November 5, 2003, he had been at a friend’s house on Lewis Street, smoking crack cocaine. The appellant said that to smoke the crack cocaine, he took a cigar or cigarette, crushed a rock of crack cocaine, and put it into the cigar or cigarette, sometimes adding marijuana. The appellant ran out of cigarettes and went to a nearby store across Lafayette Street to purchase more. The appellant took with him his last rock of crack cocaine. At the store, the appellant bought two cigars, four cigarettes, juice, and a lighter.

As he was returning from the store, the appellant saw the officers driving in the area. The appellant said that they did not look like police; they looked like drug users. The appellant acknowledged that the area was known for the buying and selling of drugs. Initially, the appellant testified that the officers asked if he knew “somebody with a thirty.” However, the appellant then acknowledged that Officer Fox actually asked him, “[D]o you have a thirty.” The appellant knew that Officer Fox meant thirty dollars worth of crack cocaine. The appellant said that he took out his last rock of crack cocaine and handed it to Officer Fox. Officer Fox then handed the appellant thirty dollars.

The appellant stated that he gave the officers crack cocaine because “[f]or one, I can go and get more, and for two, being in that area, white people draws the police, and I was in that area and I didn’t want the police drawn to that area.” The appellant said that he did not want police in the area because he had been getting high.

The appellant admitted that he did not have a spotless criminal record. He acknowledged that he had previous convictions for aggravated robbery, altering tags, and two convictions for simple possession of cocaine.

Based upon the foregoing, the jury found the appellant guilty of selling less than .5 grams of cocaine within 1,000 feet of a school zone, a Class B felony. The trial court sentenced the appellant as a Range I standard offender to eleven years incarceration. The appellant timely filed a notice of appeal.

## **II. Analysis**

### **A. Jury Instructions**

On appeal, the appellant raises the following issues:

[(1)] Did the trial court err in omitting from the pattern jury instruction that the offense of casual exchange does not exclude a transaction in which money is involved, and in instructing the jury, pursuant to the state's request, regarding specific factors to consider in determining whether a casual exchange occurred?

[(2)] Did the trial court err in denying the defendant's motion to define the term "casual exchange" to coincide with the instruction defining sale of a controlled substance, and to instruct the jury that it should find that the defendant did not casually exchange a controlled substance in order to convict him of selling a controlled substance?

In order to address the appellant's concerns, we must first outline what transpired at trial regarding the jury instructions. Prior to trial, the appellant filed a written request asking the trial court to instruct the jury that in order to convict the appellant of the sale of a controlled substance, the jury was required to find as an essential element that the appellant did not casually exchange the controlled substance.<sup>1</sup> At the close of the State's case-in-chief, the court held a jury-out hearing

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<sup>1</sup> Tennessee Pattern Jury Instruction 31.01 provides in part the following instruction regarding the sale or delivery of a controlled substance:

Any person who commits the offense of unlawful [sale] . . . of a controlled substance is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(continued...)

regarding the request for the special instructions and whether casual exchange should be instructed as a lesser-included offense. During the hearing, the trial court stated, “I am not going to include in my instruction under sale a third essential element and that is that the defendant did not casually exchange the substance. That is not an essential element of the crime. I’m not going to charge that.”

The State objected to the trial court giving a lesser-included offense instruction on casual exchange, arguing that the proof would not support such an instruction. Based upon the proof adduced during the State’s case-in-chief, the trial court agreed that there was no evidence of any crime other than the sale of a controlled substance. Accordingly, the court ruled that it would not charge casual exchange as a lesser-included offense.

After the appellant testified, he renewed his motion for a charge on casual exchange. The State again objected to the charge but argued that if the court deemed the instruction appropriate, additional language be added to Tennessee Pattern Jury Instruction 31.05 which defines casual exchange. Specifically, the State proposed that the pattern instruction include an example of casual exchange and four factors which the jury should consider when determining whether the transaction was a casual exchange. The proposed instruction provided:

A casual exchange is an exchange made without design. Such an exchange may include a transaction in which money is involved. A casual exchange is simply the transfer of drugs without the characteristics of bargaining, pecuniary motive, a design typical of a sale; thus, a common example of casual exchange is the spontaneous passing of a small amount of drugs at a party. Whether the transfer [is] a casual exchange is to be determined from all the facts and circumstances of the case, including:

(1) whether the defendant gave the drugs to the buyer out of friendship or as a friendly gesture;

(2) whether there was anything other than a pecuniary motive for the transfer of the drugs;

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<sup>1</sup>(...continued)

(1) that the defendant [sold] . . . [cocaine], a Schedule [II] controlled substance;

and

(2) that the defendant acted knowingly.

(footnote omitted).

(3) whether there was a prior relationship between the defendant and the buyer; and

(4) whether there was a reason for the defendant and buyer to be together other than for the buyer to purchase drugs.

The court asked the State, “Well, now why would I tell the jury a common example [of casual exchange] when I don’t in other situations?” The State contended that the examples would illustrate for the jury the differences between a sale of a controlled substance and a casual exchange. The court responded, “[T]hat would imply that I’m commenting on the evidence,” noting that it was the province of the jury to make a factual determination whether the proof constituted a sale or casual exchange.

The trial court determined that, based upon the appellant’s testimony, casual exchange should be charged as a lesser-included offense. The court stated:

I am going to include, instead of just stopping at which money is involved, I’m going to go on and say casual exchange is simply the transfer of drugs without the characteristic of bargaining, pecuniary motive, and a design typical of a sale.

Whether a transfer is a casual exchange is for the jury to determine from all the facts and circumstances of the case including, and then I’m going to cite these four [factors requested by the State].

Following closing arguments, the trial court instructed the jury on the elements the State needed to prove in order to find the appellant guilty of the sale of cocaine.<sup>2</sup> Then, the court instructed the jury on casual exchange. Regarding casual exchange, the court said:

For you to find the defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant either intentionally, knowingly or recklessly casually exchanged a controlled substance;

and

(2) that the substance was cocaine.

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<sup>2</sup> Although the technical record does not contain a copy of the written instructions, the trial transcript includes the trial court’s charge to the jury.

It may be inferred from circumstances indicating a casual exchange among individuals of a small amount of controlled substances that the controlled substances so exchanged were possessed not with the purpose of selling or otherwise dispensing them. You are instructed that exchange means to part with, give, or transfer a substance in consideration of something received as an equivalent. Casual means without design. The term casual exchange is simply the transfer of drugs without the characteristics of bargaining, pecuniary motive, and design typical of a sale. Whether the transfer is a casual exchange is to be determined from all the facts and circumstances of the case, including:

(1) whether the defendant gave the drugs to the buyer out of friendship or as a friendly gesture;

(2) whether there was anything other than a pecuniary motive for the transfer of the drugs;

(3) whether there was a prior relationship between the defendant and the buyer; and

(4) whether there was a reason for the defendant and buyer to be together other than for the buyer to purchase drugs.

The court then defined the applicable mental states.

As we earlier stated, on appeal the appellant essentially raises three concerns regarding the trial court's jury instructions relating to casual exchange. First, the appellant complains that the trial court omitted a portion of the pattern jury instruction which informed the jury that a casual exchange does not exclude a situation where money is involved. Second, the appellant contends that the trial court erred in granting the State's request for a special instruction which included four factors to consider when determining whether a transfer is a casual exchange. Third, the appellant contends that the jury should have been told that to find the appellant guilty of the sale of a controlled substance, it first had to find that he did not casually exchange the substance. The appellant also contends that the jury should have been instructed on the definition of casual exchange as part of the definition for the sale of controlled substances in addition to defining casual exchange as a separate, lesser-included offense.

Initially, we note that a defendant has a "constitutional right to a correct and complete charge of the law." State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990). Therefore, trial courts "should give a requested instruction if it is supported by the evidence, embodies a party's theory, and is a correct statement of the law." State v. Phipps, 883 S.W.2d 138, 150 n. 20 (Tenn. Crim. App. 1994). However, trial courts need not give a requested instruction if the substance of the instruction is

covered in the general charge. State v. Zirkle, 910 S.W.2d 874, 892 (Tenn. Crim. App. 1995). Moreover, we have previously noted that “[w]e must review the entire [jury] charge and only invalidate it if, when read as a whole, it fails to fairly submit the legal issues or misleads the jury as to the applicable law.” State v. Forbes, 918 S.W.2d 431, 447 (Tenn. Crim. App. 1995). To save a constitutional error in a jury instruction from reversal, the error must be harmless beyond a reasonable doubt. See State v. Faulkner, 154 S.W.3d 48, 59-60 (Tenn. 2005).

Tennessee Pattern Jury Instruction 31.05 provides in pertinent part:

It may be inferred from circumstances indicating a casual exchange among individuals of a small amount of controlled substances that the controlled substances so exchanged were possessed not with the purpose of selling or otherwise dispensing them. You are instructed that “exchange” means to part with, give, or transfer a substance in consideration of something received as an equivalent. “Casual” means without design. The term “casual exchange” does not exclude a transaction in which money is involved.

(footnotes omitted). The appellant first complains because the trial court did not instruct the jury according to the pattern jury instruction that a casual exchange does not exclude a transaction involving money.

In the instant case, the appellant’s entire defense was that he was not guilty of the sale of cocaine, but he was guilty of a casual exchange. Accordingly, the accuracy of the casual exchange instruction was paramount. The omission of the contested portion essentially deprived the appellant of having the jury be instructed on the crux of his defense. Thus, while it appears that the omission was inadvertent, we are nonetheless compelled to conclude that the error merits reversal.

The appellant further complains that the trial court should not have granted the State’s request for a special instruction giving examples of casual exchange to the jury. We agree. “The proper function of a special instruction is to supply an omission or correct a mistake made in the general charge, to present a material question not treated in the general charge, or to limit, extend, eliminate, or more accurately define a proposition already submitted to the jury.” State v. Cozart, 54 S.W.3d 242, 245 (Tenn. 2001). In the instant case, the jury instructions, without the special instruction, were sufficient to properly instruct the jury as to the law in the instant case. In fact, the trial court itself correctly noted that to give the requested instruction could be interpreted as a commentary on the evidence. This court has previously cautioned that while giving examples or indicators may serve to illustrate when a casual exchange exists, such examples “are not the definition set forth for a casual exchange.” State v. Lee O. Anderson, No. W2000-00671-CCA-R3-CD, 2001 WL 128589, at \*5 (Tenn. Crim. App. at Jackson, Feb. 9, 2001). Moreover, the illustrations provided by the trial court were by no means exhaustive of the possible scenarios which could constitute a casual exchange. When considered in conjunction with the trial court’s error in

omitting part of the pattern instruction, the erroneous special instruction as given appears to direct the jury to find the appellant not guilty of a casual exchange in favor of a finding of guilt on the sale of cocaine, thereby compounding the former error and warranting reversal.

Regarding the appellant's contention that the trial court should have defined casual exchange as part of the definition of a sale of a controlled substance, thereby requiring the jury to find that the appellant did not casually exchange the cocaine before finding him guilty of the sale of cocaine, we agree with the trial court that the appellant is seeking to add an essential element to the offense of sale of a controlled substance. Tennessee Code Annotated section 40-17-417(a)(3) (2003) does not require a finding that the transaction was not a casual exchange. This issue is without merit.

### B. Sentencing

The appellant's final issue concerns the sentence imposed by the trial court. Although we have reversed the appellant's conviction, we will address his sentencing issue to facilitate further appellate review. Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

The appellant was convicted of a Class B felony offense. Additionally, the court found that the appellant was a Range I standard offender. Therefore, the possible range of sentencing was eight to twelve years.

The appellant's presentence report reflects that he has previous criminal convictions. Specifically, the appellant has one conviction for aggravated robbery; one conviction for misdemeanor theft; one conviction for simple possession of cocaine; three convictions for driving while license suspended; one conviction for altering, falsifying, or forging a title, assignment, or plates; and three convictions for criminal trespass. The appellant did not dispute the existence of these previous convictions.

At the conclusion of the sentencing hearing, the trial court found that one enhancement factor was applicable to the appellant, specifically that he had a previous history of criminal convictions or criminal behavior. See Tenn. Code Ann. § 40-35-114(2) (2003). The court found that one

mitigating factor was applicable, namely that the appellant's criminal conduct neither caused nor threatened serious bodily injury. See Tenn. Code Ann. § 40-35-113(1) (2003). However, the court determined that this mitigating factor was entitled to no weight. Accordingly, the court sentenced the appellant to eleven years incarceration.

On appeal, the appellant "does not dispute that he has a history of criminal convictions, [however,] he submits that this enhancement factor alone does not justify the sentence imposed, especially when the trial court should have given some weight to the applicable statutory mitigating factor." We agree with the trial court that enhancement factor (2) is applicable to the appellant. See Tenn. Code Ann. § 40-35-114(2). The appellant has more than enough prior convictions to entitle this factor to significant weight.

The trial court also found that mitigating factor (1), that the appellant's conduct neither caused nor threatened serious bodily injury, was applicable to his conviction for selling cocaine. See Tenn. Code Ann. § 40-35-113(1). Our supreme court has previously concluded that mitigating factor (2) may be applicable in drug cases. See State v. Ross, 49 S.W.3d 833, 848 (Tenn. 2001). However, our case law consistently provides that this mitigating factor may be entitled to little, if any, weight. See id. In the instant case, the trial court found:

Clearly, [the appellant] is an individual who is – has an extensive history. He continues to violate the law, as evidenced by his behavior. And how this case arose, it arose while he was pending trial on another case within the same area, for which the jury found him guilty of simple possession [of cocaine] in that case. So I'm going to enhance his sentence to eleven years. I'm not going to give any weight at all to the [mitigating] factor number one, so it's going to be eleven years.

We conclude that the trial court did not err in finding mitigating factor (1) entitled to no weight nor did the court err in imposing a sentence of eleven years. See State v. Elmore Lewis Baker, Jr., No. E2003-00073-CCA-R3-CD, 2003 WL 22148780, at \*4 (Tenn. Crim. App. at Knoxville, Sept. 18, 2003).

### **III. Conclusion**

Based upon the trial court's improper jury instructions, we reverse the appellant's conviction and remand for a new trial.

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NORMA McGEE OGLE, JUDGE